

MAY 21 1965

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1964

No.  63

PHILIP R. CONSOLO, *Petitioner*,  
v.  
FEDERAL MARITIME COMMISSION,  
UNITED STATES OF AMERICA,  
and  
FLOTA MERCANTE GRANCOLOMBIANA, S.A.,  
*Respondents*.

On Petition for Writ of Certiorari to the  
United States Court of Appeals for  
the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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**I. As to the Question of Jurisdiction of the Court of Appeals  
to Review Reparation Orders**

A. The Memorandum for the Federal Maritime Commission and the United States agrees that the jurisdictional question presented by the Petition is:

(a) of substantial importance and (b) "closely related to the question presented in No. 606 . . ." Further, the Government Memorandum agrees that Petitioner is right in his position that the Hobbs Act (5 U.S.C. 1032) does not confer jurisdiction upon the courts of appeals to review reparation orders at a carrier's request. The Government Memorandum suggests, however (p. 9), that "the situation changes when the *shipper* first seeks review of the reparation order in the court of appeals" (recognizing that even this question is "not without substantial difficulty and some importance"). This suggestion requires two brief comments:

(i) The Government's Memorandum takes the position that the statute does *not* confer jurisdiction on the courts of appeals to hear carriers' suits attacking reparation orders. The Memorandum does not explain (except in the interests of "economy of judicial effort") how the statutory jurisdiction can be expanded because the shipper had to protect his rights by a suit in a court of appeals. This is plainly not a situation where the courts of appeals act as courts of general jurisdiction: they have no powers to award damages to injured shippers, and their jurisdiction is restricted to review "pursuant to the provisions of Section 31 of the Shipping Act, 1916 . . ." Section 31 simply does not include review of reparation orders at carriers' request, and Section 31 can not be amended by other proceedings in the courts of appeals. Thus, this case does raise the broad, important, question as to the jurisdiction of the courts of appeals under the Hobbs Act.

(ii) When the former Federal Maritime Board refused to grant full reparation, Petitioner (the injured shipper) was required to bring his suit to review the

partial refusal in the court of appeals on the authority of *D. L. Piazza Co. v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954), cert. denied 348 U.S. 839.

In *Piazza*, the court refused to apply the holding of *United States v. Interstate Commerce Commission*, 337 U.S. 426 (one-judge review of denials of reparation) to Maritime Board orders. Whether *Piazza* is right or wrong is not directly in issue here, but the validity of the reasoning in *Piazza* could very well be affected by a badly-needed decision of this Court settling the jurisdiction to review reparation orders under the Shipping Act. Thus, it seems likely that the substantial jurisdictional question tendered by the petition will, if decided, also dispose of the suggestion that the court below somehow acquired jurisdiction to deny reparation because *Piazza* sent the injured shipper to a court of appeals before bringing suit in a District Court.<sup>1</sup> In any event, the confusion as to jurisdiction to review reparation orders is evident, as is the need for guidance by this Court.

B. The Brief for Respondent Flota (the carrier) also calls for two brief comments:

(i) Flota first argues (Br., pp. 9-12) that Petitioner "should not now be heard" to challenge the jurisdiction of the Court of Appeals. In support of this argument, respondent reprints petitioner's motion to dismiss for want of jurisdiction, omitting the extensive argument that showed the court had no jurisdiction. We want to be plain that what remains in the appendix to Flota's

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<sup>1</sup> It is also worth noting that the carrier (Flota), not the shipper, came first to the court of appeals (on November 13, 1963) seeking review of the Commission's second reparation order here in issue, followed by petitioner, the shipper (on November 14, 1963). We do not, however, believe that the sequence of filing affects the jurisdictional issue—the jurisdiction is statutory, and the statute turns on no such minutiae.

brief is petitioner's claim that *if* the court of appeals took jurisdiction, it should have required the carrier to post a bond: in this way a court of appeals might have enforced the reparation order and terminated the controversy. What the court of appeals did, however, was to hold it had jurisdiction to review but not to enforce any order. This construction means that an injured shipper can lose but cannot win on a court of appeals review—a result which effectively repeals the reparation remedy provided by the Shipping Act.

(ii) Flota's Brief (pp. 12-15) argues that "the ruling of the court of appeals on the jurisdictional issue is correct." This, we can assume, is an appropriate type of argument to this Court if the writ of certiorari is granted, but it does not constitute an answer to the Petition for the writ. The Petition asserts that it is urgent and important for this Court to decide whether the ruling of the court below was correct. It may be useful, however, to point out that Flota's discussion of sections 30 and 31 of the Shipping Act (establishing different procedures for reparation orders and other orders) omits reference to Section 29 of the Shipping Act. Section 29 makes an explicit and significant distinction: it speaks of "any order of the Federal Maritime Board, other than an order for the payment of money" (i.e., a reparation order). This distinction is crucial.

## **2. As to the Standard of Review in Reparation Cases**

The Government's Memorandum says (pp. 10-12) (i) that the "equity" doctrine announced by the court below is not a new standard and (ii) that the court below erred in substituting its judgment for the agency's judgment, but that this was not "flagrant." Flota's Brief (pp. 17-20) (i) repeats parts of the deci-

sion of the court below and (ii) asserts that "relevance of such equitable considerations" has been recognized under other statutes.

A. Neither the Government Memorandum nor Flota's Brief cites a single case where any court has held that an agency must decide whether reparation would be "equitable" *when the agency has found the carrier's past practices to be unjustly and unreasonably discriminatory*. Of course, as the Government's Memorandum says (p. 11), the Interstate Commerce Commission has "discretion" to find that a rate is unreasonable for the future but perhaps not for the past. Agencies have broad discretion. But no precedent holds that when there has been a finding that a rate or practice was unreasonable and discriminatory in the past, a new, hitherto undiscovered, and undefined "equitable" power exists to deny reparation.

The uncertainties raised by the newly-discovered "equitable" standard are graphically illustrated by the argument appearing on page 11 of the Government's Memorandum. The Memorandum says that proof of statutory violation and damages shifts a burden to the carrier—a "heavy burden"—to show that special circumstances (undefined) warrant a refusal of reparation. These suggestions for procedure in reparation cases are highly novel. The same rules of burden of proof do not appear in the decision below; quite the contrary, the decision below asserts that the reparation remedy is of declining and minor importance (App. to Pet., pp. 9a-10a).

The injection of a new standard justifying denial of reparation is not a mere matter of semantics. Such a new standard, if it existed, would call forth a host of new litigation seeking to define the "equities" in future cases. Such a new standard, if it existed, would require

new rules of evidence and burden of proof, as the Government's Memorandum shows. The existence or non-existence of such a standard is, plainly, a matter of major importance warranting this Court's attention.

B. Further, the issue Petitioner raises is not restricted to the question whether the agency has "equitable" discretion to deny reparation. The agency here found that it would be equitable to award reparation. The point is that the court of appeals decided that it was for the court, not the agency, to decide the equities. Thus, the new and undefined "equitable" standard is not alone a standard for agency action; in practice it amounts to a new standard of judicial review. The Administrative Procedure Act has somehow, in practice, been amended to include a new standard for court review where the reviewing court of appeals will decide what is "equitable." This goes far beyond any previously known doctrine and raises a broad issue as to roles of agencies and courts urgently calling for this Court's attention.<sup>2</sup>

### 3. As to the Jurisdiction of this Court

Flota's Brief (pp. 1-4) contains a number of assertions purporting to challenge this Court's jurisdiction to grant the writ sought. The confusion thus invoked can be simply dispelled by restating again what the court below did.

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<sup>2</sup> The Government's Memorandum (p. 12) suggests that the court of appeals decision was "intertwined" with a legal issue—whether the law was unsettled, thus justifying the carrier's conduct. Not so; the carrier announced at the beginning of the hearing that it *accepted* the Maritime Board's precedent as "good, valid law". (Quoted by the court below in its first decision—App. to Pet., p. 28a). The issue is not a legal issue, but a question of motivation—of fact—as to whether unsettled law had anything to do with the carrier's actions. Again the presence of such an issue demonstrates the pitfalls of a doctrine calling for a determination of undefined "equities".

The judgment as to which the writ of certiorari is sought is the December 17, 1964 judgment of the Court of Appeals (App. to Pet., p. 72a, duly filed with this Court) which finally determined the controversy by reversing and vacating the reparation order of the Federal Maritime Commission. The earlier decision of the Court of Appeals below did not terminate the controversy. The earlier decision sent the case back to the Commission for an additional finding: to consider whether it would be inequitable to force Flota to pay reparation.<sup>3</sup> The court's language (App. to Pet., p. 37a) seemed to say that the court was going to respect the agency's new-found discretion to decide the "equities." After the agency found, on the same record, that it would be highly equitable to require payment of reparation, the court, on second review, determined to deny all reparation, no matter what the agency found. It is this final judgment as to which the writ is sought.

### CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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<sup>3</sup> Contrary to Flota's assertion, one certified copy of the earlier decision was filed with this Court; the copy was not designated as part of the record because the writ is sought as to the final judgment of the court below.